

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 10-0314

GAYLE ABRAHAM MORRIS,

Petitioner,

v.

CASCADE COUNTY DETENTION CENTER
and EIGHTH JUDICIAL DISTRICT COURT,
DEPT. A,Respondent.

FILED

JUL 19 2010

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

In compliance with this Court's order of June 29, 2010, the Attorney General's Office responds to the petition for a writ of habeas corpus filed by Gayle Abraham Morris.

BACKGROUND

Morris, the proprietor of Really Windy's Gentleman's Club in Great Falls, was charged with Felony Promotion of Prostitution in July 2009. The supporting affidavit alleged that Morris promoted prostitution of exotic dancers employed by the Club, who performed sex acts and engaged in sexual intercourse with male customers for significant sums of money, including in a private "lap dance" room on the premises. The Information alleged that Morris knowingly operated the bar

and dance club as a place of prostitution. (Information and Affidavit, attached as Ex. 1.)

Morris ultimately entered in a plea agreement in which he agreed to plead no contest to amended charges of Misdemeanor Accountability to Prostitution and Misdemeanor Obstructing a Peace Officer. The agreement required the State to recommend fines and consecutive, six-month suspended sentences. The recommendation, however, was not binding upon the sentencing court: Morris did not have the right to withdraw his no contest pleas if the court did not accept the County Attorney's sentencing recommendation. The agreement also provided:

Each party recognizes that sentencing in this matter is entirely within the discretion of the presiding District Court Judge, subject to the limits of statutory and case law.

(Pet'r's Ex. C at 1, ¶ B.)

The sentencing court, Judge McKittrick presiding, imposed consecutive six-month sentences to the Cascade County Detention Center. As discussed in Morris's pending petition, Judge McKittrick gave reasons for his sentence, including the serious nature of the offense, the harm to the community, and the harm to the young women who were engaging in prostitution. The court observed that as a former Mayor of Great Falls and Cascade County Commissioner, Morris should have known better. As reflected in the partial transcript appended to Morris's habeas petition, the sentencing court determined that its sentence needed

to clearly convey that “this kind of conduct is not acceptable in this community.” (Pet’r’s Ex. I, Tr. at 1:13-14.)

Without objection from Morris’s counsel, the sentencing court ordered Morris to be taken into custody to serve his jail term. (Pet’r’s Ex. I, Tr. at 1:19-20; Pet’r’s Ex. F.) Morris subsequently filed a Motion For Release Pending Appeal, which the district court denied. (Pet’r’s Exs. A, G.) Morris did not ask for an evidentiary hearing.

SUMMARY OF REASONS THE WRIT SHOULD BE DENIED

After acknowledging that a jury would find him guilty, Morris was convicted of serious offenses involving prostitution in Great Falls. He received consecutive six-month jail terms for his crimes. Prior to his conviction, Morris was presumptively entitled to release because he was presumed innocent. Now that Morris has been convicted, however, Montana law presumes that Morris should remain incarcerated pending appeal. Rather than addressing the forgoing presumption and carrying his burden of proving entitlement to habeas relief, Morris minimizes the seriousness of his criminal behavior while inviting this habeas Court to substitute its judgment for the judgment of the sentencing court.

Morris’s petition for habeas corpus relief should be denied.

ARGUMENT

MORRIS HAS NOT DEMONSTRATED ENTITLEMENT TO EXTRAORDINARY HABEAS CORPUS RELIEF.

Habeas petitioners have the burden of demonstrating entitlement to relief. Miller v. Eleventh Judicial District, 2007 MT 58, 336 Mont. 207, 154 P.3d 1186. Morris dodges his burden of proof by raising improper and unfair allegations against Judge McKittrick. Though the State did not recommend jail time, Morris knew the recommendation was not binding on the sentencing court. Further, the district court was not punishing Morris for being a public figure as Morris now claims. Rather, given his prior service as an elected official, Morris's recent criminal behavior reflected a brazen disrespect for the law and the welfare of the Great Falls community. The court's sentence was legal and, therefore, well within the bounds of reason. Morris knew the statutory maximum was possible and Judge McKittrick was not obliged to give him more favorable treatment.

A. The Law Presumes That An Incarceration Sentence Will Be Served Pending Appeal.

Morris emphasizes that he was released on bond prior to being convicted. Prior to conviction, however, Morris was presumed to be innocent and, therefore, presumptively entitled to release. In contrast, following conviction the presumption is that the offender will serve his incarceration sentence pending appeal. Duncan v. State, 2007 Mont. LEXIS 246, ¶ 4. As the petitioner, Morris

has the burden of overcoming that presumption. Morris, however, fails to acknowledge that the presumption of incarceration pending appeal exists or applies.

B. The Writ Of Habeas Corpus Is Not Available To Attack A Lawful Conviction or Sentence.

The purpose of the writ of habeas corpus is to remedy gross wrongs or miscarriages of justice where legal avenues of relief are unavailable or inadequate. The writ of habeas corpus does not substitute for direct review. See, e.g., Morrison v. Mahoney, 2002 MT 21, ¶ 9, 308 Mont. 196, 41 P.3d 320; Rudolph v. Day, 273 Mont. 309, 311, 902 P.2d 1007, 1008 (1995); Duncan v. State, 243 Mont. 232, 233, 794 P.2d 331, 332 (1990). Consequently, the legislature has recognized that the writ is not available to challenge a conviction or sentence of a person who has exhausted the remedy of appeal. Mont. Code Ann. § 46-22-101(2). Though this limitation on habeas relief is referred to as the “procedural bar,” the limitation actually describes the narrow purpose and substantive scope of habeas relief.

This Court recognizes a narrow exception to the procedural bar when a person is incarcerated “pursuant to” a facially invalid sentence, i.e., a sentence which exceeds statutory or constitutional limits. See Lott v. State, 2006 MT 279, 334 Mont. 270, 150 P.3d 337. The Lott exception to the procedural bar reflects the fundamental purpose of habeas corpus, which is to remedy “illegal” restraints or imprisonments. See Mont. Code Ann. § 46-22-101(1).

Here, to the extent Morris's petition collaterally attacks his sentence, Morris's challenge is procedurally barred because his sentence is within statutory parameters and facially valid. On the other hand, to the extent Morris may be arguing that he should be released pending appeal because his appeal is likely to succeed, Morris's argument fails for the same reason. If not procedurally barred, Morris's sentencing argument is without merit because the sentence Morris received is within statutory parameters.

Apart from the unavailability of habeas corpus as a vehicle for challenging a legal sentence, Morris also fails to appreciate that this habeas proceeding is independent of the proceedings below. Miller v. Eleventh Judicial District, 2007 MT 58, ¶ 5.

Thus, Morris's allegations of bias and abuse of discretion are not properly before this Court. Morris should be expediting his direct appeal rather than pursuing habeas relief to challenge his facially valid sentence. Regardless, there is no support for Morris's claim that Judge McKittrick is biased and no merit to Morris's criticism of the reasons for the court's sentence. As discussed above, Morris was not punished for his prior public service. He was punished for his crimes. Turning to Morris's suggestion that his involvement with prostitution at Really Windy's Gentleman's Club did not have a ripple effect in the community, Morris has provided no evidence that he objected to the sentencing court's reasons

at the time of sentencing. If Morris had objected, the district court could have addressed how illegal prostitution at Really Windy's went hand-in-hand with the sale and use of dangerous drugs such as methamphetamine, cocaine, Fentanyl (a powerful narcotic intended for the treatment of persons with end-stage cancer), Oxycontin, morphine, and ecstasy, as evidenced by multiple prosecutions of exotic female dancers and male patrons arising from these activities. This Court can take judicial notice of the existence of these prosecutions and sentences, including for example, the sentencing judgment and charging documents in State v. Jessica Ruth Burrington (DDC-09-285), attached as Ex. 2. Morris's involvement in prostitution caused significant community harm.

Turning to Morris's claim that his sentence shocks the conscience, is grossly disproportionate, and constitutes cruel and unusual punishment, these claims are based upon the unverified and self-serving representations of Morris's counsel. (Pet. at 7.) Counsel's arguments are not evidence. Conclusory assertions are insufficient to support habeas relief. See Ellenburg v. Chase, 2004 MT 66, ¶ 16, 320 Mont. 315, 87 P.3d 473.

C. Morris Has Not Overcome The Presumption of Incarceration.

As discussed previously, while an accused is presumptively entitled to release pending trial, the presumption after conviction and pending appeal is that the convicted person shall be detained "unless the court finds that, if released, the

defendant is not likely to flee or pose a danger to the safety of any person or the community.” Mont. Code Ann. § 46-8-107. Duncan v. State, 2007 Mont.

LEXIS 246, ¶ 4. The petitioner “bears the burden of overcoming a presumption that incarceration is appropriate.” Id. Thus, Morris “has the burden of presenting to this Court a record that is sufficient to make a prima facie showing that the order of the District Court constituted a violation, deprivation, infringement, or denial of his constitutional, statutory, or legal rights.” Miller, ¶ 14.

Here, Morris fails to acknowledge his burden of proof, improperly challenges his facially valid sentence, makes an unfounded allegation of judicial bias, and minimizes the harm he caused to the community. Because Morris is not challenging his convictions on appeal, the very least Morris would have to show to be entitled to release pending appeal is that he appreciates the seriousness of his criminal behavior and the harm he has caused to the community. In effect, Morris asks this Court to minimize his crimes and to endorse his view that he should not be incarcerated at all. Morris’s minimization suggests increased risks of flight and to public safety. Cf. Duncan, ¶ 6 (“the risk of flight is higher once a person has been convicted.”)

Morris also complains that the district court did not enter specific findings of fact. Morris, however, did not ask for a hearing. (Pet’r’s Ex. G.) In any event, “[a]lthough there are statutory criteria for granting bail pending appeal, there are

no such criteria for denying bail on appeal. The court is under no obligation to enter any findings of fact if it denies bail.” Phillips v. State, 2006 Mont.

LEXIS 171, ¶ 4. Morris’s argument that the district court needed to revoke its earlier release order is also without merit. Apart from Morris’s failure to raise this argument below, release prior to conviction is irrelevant to release after conviction. The district court ordered Morris to begin serving his sentence and denied release pending appeal, the effect of which was to revoke any prior release orders.

This Court should reject Morris’s invitation to substitute the writ of habeas corpus for direct review and deny Morris’s petition for release pending direct appeal of Morris’s statutorily authorized sentence.

CONCLUSION

For the forgoing reasons, Morris’s petition for habeas corpus relief should be denied.

Respectfully submitted this 19th day of July, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing >>>
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DATED: 7/19/10 Mark Matthews